89-1052

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

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QUESTIONS PRESENTED

1. Does the Limitation of Liability Act, 46 U.S.C. App. §§ 181, 183-189, provide a source of jurisdiction in the district court independent of admiralty jurisdiction under 28 U.S.C. § 1333?

2. Does the Limitation of Liability Act, 46 U.S.C. App. §§ 181, 183-189, which by its express terms applies to vessels used on lakes, rivers, or in inland navigation, apply to vessels used on waters lying wholly within a state where such waters are capable of use as a highway in commerce?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were the petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., and the respondents, Harvey G. Morts, Barbara Marlene Wilkerson, Terry Gene Morts, Fred R. Greenburg, Frances V. Greenburg, Karron Lee Webb, Heather Webb, Holly Webb, Sharon Rice, and E. Keith Rice. The respondents in this Court are identical to the respondents below.

The parent companies of petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., are Entrepreneur Enterprises, Inc., Ran-nor Holding Corp., and Ideas Unlimited, Inc. Three Buoys Houseboat Vacations U.S.A., Ltd. has no affiliates or subsidiaries other than wholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND REQUEST FOR SUMMARY REVERSAL

The petitioner, Three Buoys Houseboat Vacations U.S.A., Ltd., respectfully prays that a writ of certiorari issue to review the judgment and the opinion of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled proceeding on July 5, 1989. In the alternative, petitioner prays that this Honorable Court summarily reverse the decision of the Eighth Circuit below or that this Honorable Court defer its consideration of this petition until the Court has ruled upon the petitions filed in *Sisson v. Ruby,* No. 88-2041, docketed in this Court on March 6, 1989, and *Endsley v. Young,* No. 89-30, docketed in this Court on July 10, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at 878 F.2d 1096, and is reprinted in the Appendix hereto, page A-1, *infra*. The decision of the United States Court of Appeals for the Eighth Circuit denying petitioner's Petition for Rehearing or, in the alternative, for Rehearing en banc has not been reported. It is reprinted in the Appendix hereto, page A-30, *infra*.

The Order and the Memorandum decision of the United States District Court for the Eastern District of Missouri (Nangle, C.J.) are reported at 689 F.Supp. 958. They are reprinted in the Appendix hereto, pages A-15 and A-17, *infra*.

JURISDICTION

Petitioner brought its Complaint for Exoneration from or Limitation of Liability in the United States District Court for the Eastern District of Missouri on January 26, 1988, invoking the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1333, and 1337. On June 27, 1988, the district court entered its Order and Memorandum dismissing petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim under the Limitation of Liability Act.

On petitioner's appeal, the Eighth Circuit on July 5, 1989, entered a judgment and opinion affirming the decision of the district court. A petition for rehearing or, in the alternative, for rehearing en banc was filed. On October 4, 1989, the Eighth Circuit denied the petition, Judge McMillian voting to grant the petition for rehearing en banc.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Article I, Section 8, Clause 3
Article I, Section 8, Clause 9
Article I, Section 8, Clause 18
Article III, Section 2, Clause 1

United States Code

1 U.S.C. § 3
28 U.S.C. § 1331
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Federal Rules of Civil Procedure, 28 U.S.C.

Rule A of the Supplemental Rules for Certain Admiralty and Maritime Claims

Rule F of the Supplemental Rules for Certain Admiralty and Martime Claims

The pertinent text of these provisions is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioner is a commercial charterer of vessels on the Lake of the Ozarks. The Lake of the Ozarks is a body of water located wholly within the State of Missouri formed by the impoundment of the Osage River by Bagnell Dam. The Osage River is a

historically navigable waterway of the United States and a tributary of the Missouri River. The Lake of the Ozarks is capable of sustaining commercial shipping because of its large size. A-6.

Bagnell Dam, a lockless, hydroelectric dam authorized by the Army Corps of Engineers, is owned and operated by Union Electric Company pursuant to a license issued by the Federal Energy Regulatory Commission (FERC). The FERC license specifically reserves to the United States the right to require the removal of any structure, including the dam itself, the right to construct any facility deemed necessary for navigation, the right to use all water deemed necessary for navigation, and the right to terminate the license. The license further declares the Osage River to be a navigable water of the United States, occupying United States lands, and affecting the interests of interstate or foreign commerce.

The Osage River is presently, and was historically, navigable in fact both above and below Bagnell Dam. A-6; A-26. Congress has affirmatively defined the upper limit of navigability of the Osage River to be a point well upstream from the Lake of the Ozarks. *See,* 33 U.S.C. § 41. Commercial navigation takes place on the Lake of the Ozarks in the form of the carriage of passengers and goods for hire and in the form of the transportation of goods in interstate commerce. The Coast Guard inspects passenger carrying excursion vessels on the Lake. The Coast Guard has concurrent jurisdiction with the State of Missouri on the Lake of the Ozarks and, by agreement, the State of Missouri exercises primary supervision of activities on the Lake. The Army Corps of Engineers retains authority to issue permits for the construction of obstructions to navigation on the Lake.

On August 2, 1987, a commercial service vessel owned by petitioner and operated by its employee collided with the houseboat KANTAFORDIT on the Lake. As a result of said collision, claims in excess of four million dollars ($4,000,000) were filed against petitioner. On January 26, 1988, petitioner filed its

Complaint for Exoneration from or Limitation of Liability in the United States District Court for the Eastern District of Missouri pursuant to the Limitation of Liability Act, 46 U.S.C. App. §§ 181, 183-189, and Rules A and F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure. Petitioner's complaint invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1333, and 1337.

Several claimants appeared in the action below, filing answers, claims, and motions to dismiss. On June 27, 1988, the district court dismissed petitioner's complaint for lack of subject matter jurisdiction and for failure to state a claim under the Limitation of Liability Act.

The district court held that to the extent that petitioner sought to invoke the court's admiralty jurisdiction, it lacked subject matter jurisdiction. The court held that since the Lake of the Ozarks was presently incapable of sustaining [interstate] commercial shipping, it was not "navigable" for purposes of admiralty jurisdiction. The Limitation of Liablity Act nowhere mentions "admiralty jurisdiction" or "navigability."

The district court held that it *did* have subject matter jurisdiction over a proceeding under the Limitation of Liability Act pursuant to 28 U.S.C. §§ 1331 and 1337 because a limitation proceeding arises under an act of Congress regulating commerce. A-26. The court held, however, that the Limitation of Liability Act applies only to waters which are "navigable" for purposes of admiralty jurisdiction and does not extend to a collision on waters which are closed to [interstate] commercial shipping. A-27.

The Limitation of Liability Act was amended in 1886 to expressly include "all vessels used on lakes or rivers or in inland navigation. . . ." 46 U.S.C. App. § 188. The court held, however, that this amendment was intended to make the Act applicable to all vessels regardless of the purposes for which they

were used, not to extend the Act to vessels on waters outside the admiralty jurisdiction. A-27.

Petitioner appealed to the United States Court of Appeals for the Eighth Circuit, invoking the court's jurisdiction under 28 U.S.C. § 1291 to review a final decision of the district court.

The Eighth Circuit affirmed the district court's dismissal of petitioner's complaint under the Limitation of Liability Act, but it reversed the district court's determination that it had subject matter jurisdiction. The Eighth Circuit concluded that petitioner's complaint for exoneration from or limitation of liabilty arose under *state* law and *not* under *federal* law. A-7. The court so held even though petitioner's action must be brought in federal court pursuant to federal statute, 46 U.S.C. App. §185. The court held that the federal statute creating petitioner's cause of action for limitation of liability was akin to a defense and that state tort law created the cause of action and defined the rights and obligations of the parties. A-8. The court failed to discuss the maritime claims asserted by some claimants.

The Eighth Circuit concluded that the Lake of the Ozarks failed the locality requirement of admiralty jurisdiction. It held that navigability for admiralty jurisdicitonal purposes requires contemporary navigability in fact, i.e., present interstate or foreign commercial shipping. The court held that the closing of waters to interstate commercial shipping should have the effect of eliminating admiralty jurisdiction over them. A-5-6. The court made no findings as to the temporary or permissive nature of Bagnell Dam as an impediment to interstate navigation and did not address the commerical navigation which takes place upon the Lake.

Petitioner timely filed a petition for rehearing or, in the alternative, for rehearing en banc, which was denied by the Eighth Circuit on October 4, 1989, Judge McMillian voting to grant the petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I.

The Limitation of Liablity Act, 46 U.S.C. App. §§ 181, 183-189, provides a basis for jurisdiction in the district court independent of admiralty jurisdiction under 28 U.S.C. § 1333 as a complaint under the Act arises under an act of Congress regulating commerce.

The Eighth Circuit has chosen to eschew the mandate of congressional policy expressed in the plain and unambiguous language of the Limitation of Liability Act, 46 U.S.C. App. §§ 181, 183-189, by denying jurisdiction to a complaint for exoneration from or limitation of liability arising out of the collision of two vessels on the Lake of the Ozarks because the court finds the Act repugnant:[1]

> Accordingly, if we find the Act to apply the claimants will be deprived of any remedy for Three Buoys' wrongs.[3]

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[3] Several cases have recently espoused a very unfavorable judicial attitude towards the Limitation of Liability Act. The Act is considered by many to be outmoded and the reasons for which the Act was passed have largely been replaced by the use of corporate rganization and the availability of insurance. *See e.g., Esta Later Charters, Inc. v. Ignacio,* 875 F.2d 234 (9th Cir. 1989).

To accomplish its policy objectives, the Eighth Circuit has in this case sanctioned a refusal to exercise an express grant of

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[1] The Limitation of Liability Act limits a vessel owner's liability for personal injury and property damage incurred without the vessel owner's privity or knowledge. 46 U.S.C. App. §183(a). The Act does not deprive a claimant of a remedy — it simply limits the vessel owner's liability to a successful claimant. Despite the Court's assertion, Three Buoys has not been adjudicated to have committed any "wrongs" with respect to the collision which forms the basis for the complaint at issue herein.

jurisdiction and has misapplied and misconstrued the "arising under" doctrine enunciated in *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 808 (1986) and *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8 (1983) in determining whether the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

The Limitation of Liability Act applies to "all vessels used on lakes or rivers or in inland navigation. . . ." 46 U.S.C. App. § 188. The Act permits a vessel owner to petition a district court of competent jurisdiction for the relief provided under the Act. 46 U.S.C. App. § 185. Despite this clear and unambiguous grant of jurisdiction to the district court, the Eighth Circuit has affirmed the district court's dismissal of petitioner's complaint for exoneration from or limitation of liability for lack of subject matter jurisdiction and for failure to state a claim.

It is axiomatic that in the absence of a clearly expressed legislative intent to the contrary, the language of a statute must be regarded as conclusive. *Consumer Products Safety Commission v. GTE Sylvania, Inc.,* 447 U.S. 102, 109 (1980). The Eighth Circuit has deliberately disregarded this fundamental rule of statutory construction and the express grant of jurisdiction contained in the Limitation of Liability Act in order to avoid congressional policy which the court finds repugnant. This conduct is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Eighth Circuit has misconstrued and misapplied the Limitation of Liability Act by ignoring the express language of the Act and instead has focused improperly upon the locality of the event giving rise to the limitation proceeding. The subject of the Limitation of Liability Act is vessels. The Limitation of Liabilty Act does *not* concern waterways. The Act regulates one incident of vessel ownership: the liability of the owner for personal injury or property damage occurring without his privi-

ty or knowledge. The power of Congress to regulate vessels is not limited by the admiralty jurisdiction of the district courts.

> Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce.

Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

While the Limitation of Liability Act does not specify the basis for congressional authority to pass the Act, there appear to be three bases:

1. the commerce clause (Article I, Section 8, Clause 3 of the Constitution of the United States);

2. the necessary and proper clause (Article I, Section 8, Clause 18 of the Constitution of the United States);

3. the judicial power over admiralty and maritime matters (Article III, Section 2, Clause 1 of the Constitution of the United States).

In fact, this Court has previously held that the authority of Congress to enact the Limitation of Liability Act is "derived from the power to regulate commerce and from the clause in the Constitution extending the judicial power to 'all cases of admiralty and maritime jurisdiction' " and the necessary and proper clause. *The Hamilton,* 207 U.S. 398, 404 (1907); *Kaiser Aetna v. United States,* 444 U.S. 164, 173 at fn.7 (1979); 3 *Benedict on Admiralty* § 3, p. 1-29 (7th Ed. 1986).

The Limitation of Liability Act has passed constitutional challenge. In 1880 and again in 1883, the Limitation of Liability Act was upheld as constitutional under the commerce clause. *Lord v. Steamship Company,* 102 U.S. 541 (1880); *Providence & New York S.S. Co. v. Hill Mfg. Co.,* 109 U.S. 578 (1883).

In 1889, independently of the commerce clause, this Court upheld the law under the judiciary clause, stating the Act "is

necessarily coextensive with the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends -- on the sea and the great inland lakes, and the navigable waters connecting therewith." *Butler v. Boston Steamship Company,* 130 U.S. 527, 557 (1889).

Congress has the power under the commerce clause to legislate upon matters maritime and cases arising under such legislation fall within the court's jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 and Article III, Section 2, Clause 1 of the Constitution. *See,* e.g., *Swanson v. Marra Brothers, Inc.,* 328 U.S. 1, 5 (1946) (Merchant Marine Act of 1920 (the Jones Act), 46 U.S.C. § 688); *O'Donnell v. Great Lakes Dredge & Dock Co.,* 318 U.S. 36, 39 (1943); *Maritime Service Corp. v. Sweet Brokerage De Puerto Rico, Inc.,* 537 F.2d 560 (1st Cir. 1976) (Shipping and Intercostal Shipping Acts); *Crispin Co. v. Lykes Bros. Steamship Co.,* 134 F.Supp. 704 (S.D.Tex. 1955) (Carriage of Goods by Sea Act); *Land and Lake Tours, Inc. v. Lewis,* 738 F.2d 961 (8th Cir.), *cert. denied,* 469 U.S. 1038 (1984) (Steamboat Inspection Act). *See also,* 1 *Benedict on Admiralty* § 109, p. 7-20-7-21; 7-23-7-24 (7th Ed. 1986). Congress has the power to enact the Limitation of Liability Act under the commerce clause, the necessary and proper clause, or under the Article III grant of admiralty and maritime jurisdiction to the judiciary. Congress has the power to grant jurisdiction to the district courts to hear matters arising under the Limitation of Liability Act pursuant to its Article I, Section 8, Clause 9 power to create inferior tribunals, under its necessary and proper powers, or under the judicial article.

The purpose of the original Limitation of Liability Act was to encourage investment in ships, *Richardson v. Harmon,* 222 U.S. 96, 103 (1911), and to encourage shipbuilding. *Norwich Company v. Wright,* 80 U.S. 104, 121 (1871); *Hartford Accident Company v. Southern Pacific Company,* 273 U.S. 207, 214 (1927). The district court correctly found that the purpose of the 1886 amendment (Act of June 19, 1886, C. 421, § 4, 24 Stat.

79) to the Act was "to make the Act applicable to all vessels regardless of the purposes for which they were used." A-27. Congress, contrary to the assertion of the court, intended the Act to extend "to all vessels used on lakes or rivers or in inland navigation. . . ." 46 U.S.C. App. § 188. Congress passed the amendment to the Limitation of Liability Act specifically to encourage competition between water-borne transportation and the railroad. Congress further intended to encourage the ownership of inland vessels, thereby aiding the ship-building industries. *See Cong. Rec.*, 49th Cong., 1st Sess. 1108, 1111 (February 3, 1886). The purpose of the Limitation of Liability Act is to encourage the construction, use, and ownership of vessels in commerce by limiting the liability of owners of vessels for losses which occur without their privity or knowledge.

Congress can regulate commercial vessels navigated solely upon waters within the confines of a single state. It is axiomatic that Congress has the power under the commerce clause to regulate ostensibly local activities. The commerce power:

> [E]xtends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate commerce.

United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942), *cited* in *Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264, 282 (1981); see also, Katzenbach v. McClung*, 379 U.S. 294 (1964); *Wickard v. Filburn*, 317 U.S. 111 (1942); *NLRB v. Jones*, 301 U.S. 1 (1937); *United States v. Darby*, 312 U.S. 100 (1941).

Because the Eighth Circuit finds the Limitation of Liability Act repugnant, it has declined to exercise the jurisdiction granted to it and has misapplied and misconstrued the "arising under" doctrine enunciated in *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 808 (1986) and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 (1983).

As this Court has noted in another context, federal courts have an "unflagging obligation . . . to exercise the jurisdiction given them." *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 817 (1976). The Eighth Circuit cannot ignore the grant of jurisdiction provided by 46 U.S.C. App. § 185 simply because it finds the Act repugnant.

Normal principles of statutory construction require that the courts give effect to the subtleties of the language that Congress has chosen to employ, particularly where Congress has isolated certain sections of a statute for special consideration by way of amendment. *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986). In making material changes to the language of the statute, Congress can neither be assumed to have regarded such changes as without significance, *Shamrock Oil and Gas Corporation v. Sheets,* 313 U.S. 100, 106-07 (1941), nor to have committed an oversight or to have acted inadvertently. In the absence of a clearly expressed legislative intent to the contrary, the language of the statute itself must ordinarily be regarded as conclusive. *United States v. James,* 478 U.S. 597 (1986).

The Eighth Circuit held that the 1886 amendment to the Limitation of Liability Act:

> [M]erely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters. The amendment did not expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction. (A-11)

The Eighth Circuit cites no authority for its conclusion that Congress did not intend to give effect to the plain language of the statute, i.e., that the Act should apply to "all vessels used on lakes or rivers or in inland navigation. . . ." 46 U.S.C. App. § 188. Had Congress intended the Act to apply only to vessels within the admiralty jurisdiction of the district court, it would have simply stated as much.

In denying federal question jurisdiction, the Eighth Circuit held that a proceeding under the Limitation of Liabilty Act does not arise under federal law. The Eighth Circuit held (A-8):[2]

> If a suit arises under the law that creates the cause of action then undoubtedly this case would arise under state law because it is state tort law that created the cause of action and defines the rights and obligations of the parties.

The right asserted by petitioner in the district court was unavailable to it in state court. The right to limitation of liability is a right given by federal statute. That right is enforceable *only* in federal court. The relief provided under the Limitation of Liability Act cannot be obtained in state court. State courts, by statute (46 U.S.C. App. § 185), rule of court (Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure), and decision (*Norwich Company v. Wright,* 80 U.S. (13 Wall.) 104 (1871); *Ex Parte Green (The Aloha),* 286 U.S. 437 (1932)), are incompetent to determine the vessel owner's right to limit liability and cannot act *in rem. Hartford Accident & Indemnity Co. v. Southern Pacific Co.,* 273 U.S. 207 (1927).

The Eighth Circuit's conclusion that "this case arose under state law and cannot be said to have arisen under the Limitation of Liability Act" misapprehends and misapplies *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804 (1986) and *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1 (1983). *Merrell Dow,* 486 U.S. at ____, simply stated:

> [A] complaint alleging a *violation of a federal statute as an element of a state cause of action,* when Congress has determined that there should be no private, federal cause

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[2] The Eighth Circuit's assertion that "state tort law created the cause of action" fails to explain the assertion by some of the respondents herein of wrongful death claims under *maritime* law.

of action for the violation, does not state a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. (Emphasis supplied)

The Eighth Circuit cited *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 808 (1986) for the proposition that "a defense that raises a federal question is inadequate to confer federal jurisdiction." *Id.,* 478 U.S. at 808. While a proceeding to limit liability is defensive in nature and is *ipso facto* a proceeding to limit recovery, *Black Diamond S.S. Co. v. Robert Stewart & Sons (The Norwalk Victory),* 336 U.S. 386 (1949), it is a federal statutory remedy available only in federal court. It is a "defense" to a state cause of action only to the extent that it is a congressionally approved limitation on recovery. It is a "defense" only to the same extent that the filing of a bankruptcy petition is a "defense" to a state cause of action.

II

The Lake of the Ozarks, a navigable waterway lying wholly within the State of Missouri, created by the impoundment of the Osage River, a historically and currently navigable river, is a navigable waterway for purposes of the admiralty jurisdiction of the district court as it is susceptible of use in interstate commerce.

The Eighth Circuit has taken an unwarranted and unjustifiably narrow view of admiralty jurisdiction in direct conflict with this Court's decisions in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979); *Foremost v. Richardson,* 457 U.S. 668 (1982); *The Daniel Ball,* 77 U.S. (10 Wall.) 557 (1871); and *The Montello,* 87 U.S. (20 Wall.) 430 (1874). The Eighth Circuit's requirement of actual interstate commercial shipping for admiralty jurisdic-

tion is in direct conflict with the well-entrenched "capability of use" rule enunciated in the foregoing cases.[3]

The Eighth Circuit has erroneously concluded that the absence of actual interstate or foreign commercial shipping to and from the Lake of the Ozarks has removed the Lake from the court's admiralty jurisdiction for purposes of a proceeding under the Limitation of Liablity Act. The Eighth Circuit's reasoning is based upon its misinterpretation of this Court's opinion in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979) as stated in *Livingston v. United States,* 627 F.2d 165 (8th Cir. 1980), *cert. denied,* 450 U.S. 914 (1981). *Livingston,* a panel decision, rejected existing circuit law that the Lake of the Ozarks is a navigable water within the admiralty and maritime jurisdiction of the district court and that the Osage River, navigable prior to the construction of Bagnell Dam, continues to be considered navigable thereafter. *See, Loc-Wood Boat & Motors v. Rockwell,* 245 F.2d 306 (8th Cir. 1957); *George v. Beavark, Inc.,* 402 F.2d 977 (8th Cir. 1968). *Kaiser Aetna,* a fifth amendment taking case, noted that "navigability" has been used for at least four purposes in past decisions of this Court. It noted one purpose was to establish the limits of the jurisdiction of the federal courts conferred by Article III, Section 2 of the Constitution over admiralty and maritime cases, citing *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1852). In *The Propeller Genesee Chief,* this Court stated that if a water is a public navigable water, it is to be

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[3] See also *Finneseth v. Carter,* 712 F.2d 1041, 1045 (6th Cir. 1983); *Sanders v. Placid Oil Co.,* 861 F.2d 1374, 1377 (5th Cir. 1988); *Hartman v. United States,* 522 F.Supp. 114, 116 (D.S.C. 1981); *Sawczyk v. United States Coast Guard,* 499 F.Supp. 1034, 1040 (W.D.N.Y. 1980).

The Eighth Circuit acknowleged the Sixth Circuit's holding in *Finneseth* in *Edwards v. Hurtel,* 717 F.2d 1204 (8th Cir. 1983), *on rehearing,* 724 F.2d 689 (8th Cir. 1984), but decided that case without addressing the "capability of use" issue.

regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution.

Prior to *Livingston,* petitioner's complaint under the Limitation of Liability Act would have been within the admiralty jurisdiction of the district court as the casualty which prompted the filing of petitioner's complaint occurred on navigable waters. *The Plymouth,* 70 U.S. (3 Wall.) 20, 36 (1866); *The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871). *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249 (1972) altered the "locality" test for admiralty tort jurisdiction in the aviation context by adding a "nexus" test, i.e., a requirement that the wrong bear a significant relationship to traditional maritime activity. *Id.* at 268. *Foremost Insurance Company v. Richardson,* 457 U.S. 668, 675 (1982), extended this "nexus" requirement to all maritime torts.

"Navigable waters" subject to federal admiralty jurisdiction include waters that are "navigable in fact." *The Propeller Genesee Chief v. Fitzhugh,* 53 U.S. (12 How.) 443 (1852). This Court has consistenly held that "navigability" in admiralty depends solely upon the *capability* of a waterway for use by the public as a highway for interstate commerce, not its *actual* use as such:

> [Waters] are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are *or may be conducted* in the customary modes of trade and travel on water. And a river is a navigable water of the United States when it forms by itself, or by its connection with other waters, a continued highway over which commerce is, or may be, carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.
>
> * * *

> [T]he true test of the navigability of a stream does not depend on the mode by which commerce is, or may be conducted, nor the difficulties attending navigation. * * * The *capability of use* by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

The Montello, 7 U.S. (20 Wall.) 430, 439, 441 (1974) (emphasis supplied); *See also, The Daniel Ball,* 77 U.S. (10 Wall.) 557, 563 (1871).[4] Petitioner submits that the admiralty jurisdiction of the district court extends to the Lake of the Ozarks, a public navigable waterway in law and in fact since it is a waterway which, in its ordinary condition, through its connection with other waters, forms a continuous highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), relied upon by the Eighth Circuit in *Livingston,* has not altered the definition of navigability for purposes of admiralty jurisdiction.

Navigation of vessels bears a significant relationship to traditional maritime activity. *Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 676, *rehearing denied,* 459 U.S. 899 (1982). The vessel at issue herein was a commercial vessel engaged in navigation on a water susceptible of use in interstate commerce. The federal interest in maritime commerce can be fully vindicated only if *all* operators of vessels on navigable waters are subject to uniform rules of conduct. *Id.,* 457 U.S. at 676. The term vessel, defined by Congress at 1 U.S.C. § 3, includes all types of waterborne vessels, without regard to whether they

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[4] "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

engage in commercial activities. *Id.*, 457 U.S. at 677. The "Rules of the Road," designed for preventing collisons on navigable waters, apply to all vessels without regard to their commercial or noncommercial nature. *See* 33 U.S.C. § 2001(a). Finally, Congress has directed that "[t]he admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury . . . caused by a vessel on navigable water. . . ." Extension of Admiralty Jurisdiction Act, 46 U.S.C. App. § 740. *Id.*, 457 U.S. at 678.[5]

The Eighth Circuit correctly noted the "nexus" requirement of admiralty jurisdiction. The court also correctly noted, but misapplied, the "locality" requirement. To meet the locality requirement, i.e., "navigability in fact," the Eighth Circuit required *actutal* interstate commercial navigation. The Eighth Circuit's requirement is in direct conflict with this Court's requirement of potential interstate navigation. *See, Foremost v. Richardson,* 457 U.S. 668, *rehearing denied* 459 U.S 899 (1982). Petitioner submits that the admiralty jurisdiction of the district courts and congressional authority over vessels engaged in navigation parallels those waters in which the federal navigational servitude exists.

> The navigational servitude which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as a continuous highway for the purpose of navigation in interstate commerce.

Kaiser Aetna v. United States, 444 U.S. 164, 178 (1979). While the primary focus of admiralty jurisdiction is maritime com-

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[5] In *Foremost,* 457 U.S. at 678, fn.7, this Court declined to decide whether the Extension of Admiralty Jurisdiction Act could be construed to provide an independent basis for jurisdiction. That question is now before the Court in *Sisson v. Ruby,* No. 88-204, docketed on March 6, 1989.

merce, *Foremost Insurance Company v. Richardson,* 457 U.S. 668, 676, *rehearing denied,* 459 U.S. 899 (1982), admiralty jurisdiction is not restricted solely to those persons or vessels actually engaged in interstate navigation. *Id.,* 457 U.S. at 675-76.

The Eighth Circuit and the district court conceded that the Lake of the Ozarks and the Osage River would be navigable for purposes of admiralty jurisdiction but for the lockless Bagnell Dam. Yet the dam has not changed the susceptibility of the Osage River and the Lake of the Ozarks for use in interstate commerce. The United States has scrupulously protected its interests on these waters. The courts of the United States should do the same and accept the express grant of jurisdiction provided by 46 U.S.C. App. § 188.

CONCLUSION

For these reasons, this petition for certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the United States Court of Appeals for the Eighth Circuit and the matter should be remanded to the district court for appropriate disposition.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 15, 1989

Filed: July 5, 1989

Before JOHN R. GIBSON, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and BOWMAN, Circuit Judge.

FLOYD R. GIBSON, Senior Circuit Judge.

Three Buoys Houseboat Vacations U.S.A., Ltd. [hereinafter Three Buoys] appeals an order of the district court[1] which

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[1] The Honorable John F. Nangle, Chief United States District Judge for the Eastern District of Missouri. The district court's opinion is published at 689 F. Supp. 958 (E.D. Mo. 1988).

dismissed its Complaint for Exoneration from or Limitation of Liability filed under the Limitation of Liability Act, 46 U.S.C. App. §§ 181 *et seq.* (Supp. I 1983). A service vessel owned by Three Buoys was involved in a collision with a houseboat on the Lake of the Ozarks, in the state of Missouri. Three Buoys filed its complaint in the district court seeking the protection provided under the Limitation of Liability Act. The district court rejected Three Buoys' assertion of admiralty jurisdiction as a basis for subject matter jurisdiction. The district court, however, concluded that it had subject matter jurisdiction under its general federal question jurisdiction. On the merits, the district court determined that the Limitation of Liability Act only applies to vessels which are used on "navigable" waterways as that term is defined for purposes of admiralty jurisdiction. The court also concluded that the Lake of the Ozarks was not navigable for this purpose. Accordingly, the district court dismissed Three Buoys' complaint for failure to state a claim. We affirm the decision of the district court.

I. BACKGROUND

On August 2, 1987, a service vessel owned by Three Buoys collided with a houseboat on the Lake of the Ozarks.[2] The Lake of the Ozarks is a large reservoir which was created when the Army Corps of Engineers constructed the Bagnell Dam impounding the Osage River. The Bagnell Dam has no locks which allow the passage of vessels. The lake created by the dam is now a popular recreational area for many Missourians and tourists. The lake is located entirely within Missouri.

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[2] Three Buoys is engaged in the business of chartering houseboats on the Lake of the Ozarks. The service vessel involved in the collision was sent out to service a houseboat chartered by Three Buoys. The other vessel involved in the collision was a houseboat, although not Three Buoys' houseboat.

The collision occurred at approximately 2:00 a.m. and resulted in the deaths of two passengers on the houseboat. Three other passengers on the houseboat and a Three Buoys employee on its service vessel sustained personal injuries. Several claims for wrongful death, personal injury, and property damage have been filed against Three Buoys and its vessel in the Missouri state courts.

Three Buoys filed its complaint in the district court seeking the protections provided under the Limitation of Liability Act, 46 U.S.C. app. §§ 181 *et seq.* Three Buoys maintains that the district court had subject matter jurisdiction pursuant to three federal statutes. The first, 28 U.S.C. § 1333, gives district courts subject matter jurisdiction to hear admiralty cases. The two remaining statutes, 28 U.S.C. §§ 1331, 1337, give the district courts subject matter jurisdiction to hear cases involving federal questions and cases arising under an act of Congress regulating commerce, respectively.

II. DISCUSSION

A. Subject Matter Jurisdiction

We begin our analysis by determining the basis for the district court's, and hence this court's, subject matter jurisdiction. As already noted, Three Buoys maintains that subject matter jurisdiction is proper pursuant to three statutes, 28 U.S.C. §§ 1333, 1331, and 1337. We will review each of these statutes to determine whether they provide a basis for subject matter jurisdiction.

Subject matter jurisdiction over admiralty cases is conferred by 28 U.S.C. § 1333 which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333 (1982).

In the early admiralty cases the extent of admiralty jurisdiction over maritime torts was determined exclusively through a locality test, *i.e.*, whether the tort occurred on navigable waters. In 1972, however, the Supreme Court added a nexus requirement for purposes of determining admiralty jurisdiction. In *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 268 (1972), the Supreme Court held that in order to come within the court's admiralty jurisdiction a tort must "bear a significant relationship to traditional maritime activity." We need not reach the nexus requirement in the present case because we conclude that the collision on the Lake of the Ozarks at issue in this appeal fails the locality requirement of admiralty jurisdiction.

As already noted, it is well settled that admiralty jurisdiction only extends to torts which occur on "navigable" waters. *Id.* at 253, 93 S.Ct. at 497. Therefore, we must determine whether the Lake of the Ozarks is navigable as that term is used in the context of admiralty jurisdiction.

In *Kaiser Aetna v. United States,* 444 U.S. 164, 171-72 (1979), the Supreme Court noted some of the conflicting definitions that are often applied by the lower courts in determining whether a waterway is navigable. The confusion was attributed primarily to the four distinct purposes underlying the term "navigability" as set forth in *Livingston v. United States,* 627 F.2d 165, 169 (8th Cir. 1980), *cert. denied,* 450 U.S. 914 (1981) which are:

> to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of 'navigability.'

Three Buoys argues for an expansive definition of navigable which, of course, would include the Lake of the Ozarks within its definition. In *Loc-Wood Boat & Motors v. Rockwell,* 245 F.2d 306, 307 (8th Cir. 1957), a case with facts somewhat similar to the instant case, this court stated: "The Lake of the Ozarks was created by the Bagnell Dam in the Osage River. The lake is entirely within the state of Missouri, but is navigable water within the admiralty and maritime jurisdiction of the United States." *See also George v. Beavark, Inc.,* 402 F.2d 977, 978 (8th Cir. 1968) ("If the river was navigable prior to construction of the dam, it continues to be considered as a navigability stream."). Three Buoys argues that because the Osage River was historically a navigable waterway prior to the construction of the Bagnell Dam, it retains its navigable waterway status notwithstanding the construction of the dam which prevents interstate travel on the Osage.

While *Loc-Wood Boat & Motors* and *George v. Beavark, Inc.* seem to provide strong support for Three Buoys' contentions, those cases were later disapproved in *Livingston v. United States.* In *Livingston,* this court suggested that navigability is not a static concept and once a waterway is found to be navigable this does not preclude a subsequent finding of non-navigability due to a change in circumstances.

> The history of commercial traffic on the river, whatever its intrinsic interest, does not determine the scope of present-day admiralty jurisdiction. *Notwithstanding any expressions to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact.*

Livingston v. United States, 627 F.2d at 170 (emphasis added).

In *Livingston* this court indicated that the closing of waters to commercial shipping should have the effect of eliminating admiralty jurisdiction over them. *Id.* at 169. Accordingly, this court held the "concept of 'navigability' in admiralty is proper-

ly limited to describing a present capability of waters to sustain commercial shipping." *Id.* at 169-70. When this definition of navigability is applied to the facts before us it is clear that the Lake of the Ozarks, as found by the district judge, is not a navigable waterway for purposes of admiralty jurisdiction.

Because of its large size the Lake of the Ozarks is capable of sustaining commercial shipping. Nevertheless, in order to qualify as a navigable waterway for admiralty purposes we hold that purely intrastate commercial shipping is not enough. Navigability for this purpose requires interstate or foreign commercial shipping. The federal admiralty jurisdiction is founded upon the need for a uniform body of governing law with respect to navigation and commercial maritime activity. Applying uniform rules in admiralty prevents those engaged in interstate and foreign shipping from being subjected to conflicting rules of law. Such a concern is not present in the context of purely intrastate commercial shipping because only one body of law will necessarily apply and shippers will not be subjected to conflicting legal rules. Therefore we hold that the Lake of the Ozarks is not a navigable waterway and the district court properly declined to exercise its admiralty jurisdiction over this dispute.

Our decision is controlled by the *Livingston* case. At oral argument Three Buoys urged this panel to reject the reasoning of the *Livingston* case and apply a different definition of navigability. We, of course, cannot do this. A panel of this court is not at liberty to disregard prior panel decisions even when the panel may disagree with the reasoning of existing decisions. Unless intervening Supreme Court precedent has cast doubt on the reasoning of existing circuit authority, we must apply the body of circuit law that exists when we decide a given case. Only this court sitting *en banc* can disagree with or reject existing circuit authority.

The next bases for subject matter jurisdiction asserted by Three Buoys are 28 U.S.C. §§ 1331 and 1337. Both of these

statutes require the cause of action over which jurisdiction is asserted to have "arisen under" federal law. The district court concluded that it had subject matter jurisdiction "pursuant to 28 U.S.C. §§ 1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce." 689 F.Supp. at 963. We disagree with this conclusion.

Our research has not turned up any other case in which subject matter jurisdiction over a Limitation of Liability Act proceeding has been based on either section 1331 or 1337 in the absence of admiralty jurisdiction. The Limitation of Liability Act has been considered by the federal courts for almost one hundred-fifty years, yet no reported decisions have concluded that jurisdiction for such a claim may be premised under either section 1331 or 1337. This in itself is persuasive evidence that there is a flaw in Three Buoys' contentions.

We do not believe that either of these statutes confers jurisdiction on the district court because this case arose under state tort law and cannot be said to have arisen under the Limitation of Liability Act as argued by Three Buoys. In discussing whether a cause of action arises under federal law the Supreme Court recently noted that "[t]here is no 'single, precise definition' of that concept; rather, 'the phrase "arising under" masks a welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.' " *Merrell Dow Pharmaceuticals, Inc. v. Thompson,* 478 U.S. 804, 808 (1986) (quoting *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 8 (1983)).

The Court noted, however, that "[t]he 'vast majority' of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a ' "suit arises under the law that creates the cause of action." ' " *Merrell Dow Pharmaceuticals,* 478 U.S. at 808 (quoting *Franchise Tax Board,* 463 U.S. at 8-9 (quoting *American Well Works Co. v. Layne &*

Bowler Co., 241 U.S. 257, 260 (1916))). This test, when applied to the instant facts, further supports our conclusion that this is not a case that arises under federal law. If a suit arises under the law that creates the cause of action then undoubtedly this case would arise under state law because it is state tort law that created the cause of action and defines the rights and obligations of the parties. Because the instant case does not fall within the court's admiralty jurisdiction and it is not a maritime tort it will be resolved according to Missouri state tort law. The fact that this case involves an issue of federal law does not alter our conclusion. There is a "long-settled understanding that the mere presence of a federal issue in a state cause of action does not automatically confer federal-question jurisdiction." *Merrell Dow Pharmaceuticals,* 478 U.S. at 813 (footnote omitted). Thus, Three Buoys' assertion of limited liability under the Limitation of Liability Act does not make this a case "arising under" federal law.

We recognize that Justice Holmes' test for determining the extent of federal jurisdiction is more useful as a test for inclusion rather than exclusion. Nevertheless, our holding is also consistent with the proper management of the federal judicial system. In *Merrell Dow Pharmaceuticals,* the Court reemphasized that "in exploring the outer reaches of § 1331, determinations about federal jurisdiction require sensitive judgments about congressional intent, judicial power, and the federal system." 478 U.S. at 810.

We also note that the Limitation of Liability Act is more akin to a defense. In this regard the following language taken from the *Merrell Dow Pharmaceuticals* case seems especially apposite: "Under our longstanding interpretation of the current statutory scheme, the question whether a claim 'arises under' federal law must be determined by reference to the 'well-pleaded complaint.' * * * *A defense that raises a federal question is inadequate to confer federal jurisdiction.*" 478 U.S. at 808 (quoting *Franchise Tax Board,* 463 U.S. at 9-10).

In *Franchise Tax Board* the Supreme Court discussed its earlier decision in *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667 (1950). The Court noted that "*Skelly Oil* has come to stand for the proposition that 'if, but for the availability of the declaratory judgment procedure, the federal claim would arise only as a defense to a state created action, jurisdiction is lacking.' " *Franchise Tax Board,* 463 U.S. at 16 (quoting 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2767 (2d ed. 1983)). In *Skelly Oil,* the Court concluded that the Declaratory Judgment Act was not a jurisdictional statute and it did not extend the jurisdiction of the federal courts. 339 U.S. at 671-72. The Declaratory Judgment Act was found to be procedural and did not supply a new basis for subject matter jurisdiction.

In the instant case we are confronted with a similar statute. Two circuits have very recently concluded that the Limitation of Liability Act does not provide an independent source of subject matter jurisdiction. *See Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046 (11th Cir. 1989); *In the Matter of Sisson,* 867 F.2d 341, 348-49 (7th Cir. 1989). In *Lewis Charters,* the Eleventh Circuit stated the issue before it was whether a claim "incapable of invoking admiralty jurisdiction under section 1333 is, nonetheless, cognizable in the federal court under the Limitation of Liability Act." 871 F.2d at 1052. The Court answered this question in the negative. *Id.* at 1054. While the Limitation of Liability Act provides a defense to shipowners in certain admiralty cases, it never extended the jurisdiction of the federal courts. We conclude that if but for the availability of the Limitation of Liability Act procedure the federal claim would arise only as a defense to a state tort claim, jurisdiction is lacking.

Accordingly, we hold that subject matter jurisdiction is not conferred under 28 U.S.C. §§ 1331 or 1337 because Three Buoys' complaint does not "arise under" federal law for purposes of these jurisdiction statutes. Furthermore, whether a complaint under the Limitation of Liability Act "arises under" federal law

in the absence of admiralty jurisdiction is primarily a question of mere academic interest. Because, as we discuss later, the Limitation of Liability Act's territorial application is coextensive with the territorial reach of admiralty jurisdiction, the courts will never be faced with a case in which admiralty jurisdiction is lacking yet the Limitation Act will apply. Thus, Three Buoys has nothing to gain by persuading us that this case "arises under" federal law and is thus within our federal question jurisdiction.

B. Merits

Finally, aside from the fatal jurisdictional defect, Three Buoys would not be entitled to the relief it seeks on the merits. Three Buoys is trying to limit its liability for the collision involving its service vessel and a houseboat on the Lake of the Ozarks.

The Limitation of Liability Act provides in pertinent part: "The liability of the owner of any vessel * * * for any loss, damage, or injury by collision * * * incurred without the privity or knowledge of such owner * * * shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. app. § 183 (a) (Supp. I 1983).

If the Act applies to the present case Three Buoys may escape liability for the wrongful deaths, personal injury, and property damage caused by its vessel. Under the Act the owner of a vessel may limit his liability to the value of the vessel and its freight at the conclusion of its voyage. In the present case Three Buoys' vessel is lying at the bottom of the lake and it has no value. Accordingly, if we find the Act to apply the claimants will be deprived of any remedy for Three Buoys' wrongs.[3]

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[3] Several cases have recently espoused a very unfavorable judicial attitude towards the Limitation of Liability Act. The Act is considered by many to be outmoded and the reasons for which the Act was passed have largely been replaced by the use of corporate organization and the availability of insurance. *See, e.g., Esta Later Charters, Inc. v. Ignacio,* 875 F.2d 234 (9th Cir. 1989).

Prior to its amendment, the Limitation of Liability Act did not "apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation." Limitation of Liability Act, Ch. 43, § 7, 9 Stat. 635, 636 (1851). Three Buoys argues that because the Limitation of Liability Act was amended in the late 1800's to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." Amendment to the Limitation of Liability Act, Ch. 421, § 4, 24 Stat. 79, 81 (1886), it must necessarily apply to vessels operating on the Lake of the Ozarks. Three Buoys misconstrues the nature of this amendment. This amendment was not intended to extend the territorial reach of the Limitation of Liability Act beyond the reach of admiralty and maritime jurisdiction. The amendment merely extended the Act's protections to all vessels within the court's admiralty jurisdiction, including those that were not being operated in the tidewaters. The amendment did not expand the Act's application to waters which are non-navigable for purposes of admiralty and maritime jurisdiction.

Thus, prior to its amendment the Limitation of Liability Act and admiralty jurisdiction were not coextensive. Admiralty jurisdiction extended to all navigable waters whereas the Limitation of Liability Act did not extend to rivers, lakes and inland navigation. The amendment of the Act merely extended its reach to the fullest extent of admiralty jurisdiction.

In an early case interpreting the Limitation of Liability Act the Supreme Court had this to say: "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is co-extensive, in its operation, with the whole territorial domain of that law." *Butler v. Boston Steamship Co.*, 130 U.S. 527, 555 (1889) (citations omitted).

> It being clear, then, that the law of limited liability of shipowners is a part of our maritime code, the extent of its territorial operation (as before intimated) cannot be doubt-

> ful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends — on the sea and the great inland lakes, and the navigable waters connecting therewith.

Id. at 557 (citations omitted).

Accordingly, courts have consistently limited the application of the Limitation of Liability Act to waters encompassed within the territorial domain of admiralty and maritime law.

In order to be within the reach of admiralty and maritime law, as previously noted, the waters must be navigable. Because the reach of the Limitation of Liability Act is coextensive with admiralty we will use the same definition for navigable as that which was used for admiralty jurisdiction purposes. Thus, our conclusion that Lake of the Ozarks is not navigable for admiralty jurisdiction purposes compels a conclusion that it is also not navigable for purposes of the Limitation of Liability Act.

In *Sisson,* the Seventh Circuit also interpreted the Limitation of Liability Act's territorial application to be limited to the territorial reach of admiralty jurisdiction. In addition, in the wake of the Supreme Court's recent decisions applying a nexus requirement for admiralty jurisdiction, the Seventh Circuit held that the "Limitation of Liability Act will be cognizable in admiralty only when the underlying tort has a relationship to traditional maritime activity." *In the Matter of Sisson,* 867 F.2d at 351 (footnote omitted). Thus, the Seventh Circuit has interpreted the Limitation of Liability Act to only apply to cases which meet both the locality and nexus tests under admiralty jurisdiction. Nevertheless, because the instant case fails the locality requirement we need not reach the issue decided in *Sisson, i.e.,* whether the nexus requirement applies to a Limitation of Liability Act proceeding. We note, however, that if the Limitation of Liability act application is truly co-extensive with admiralty jurisdiction such a nexus requirement would seem to apply.

Three Buoys argues that the Limitation of Liability Act is an act of Congress passed pursuant to its powers to regulate interstate commerce. Therefore, Three Buoys maintains, the definition of navigable for purposes of the Limitation of Liability Act should not be the restrictive definition used in the context of admiralty jurisdiction but rather the broad definition of navigable used in the context of the commerce clause.

As already noted, navigable has been defined in several contexts and courts must be fully aware of the purpose for which the concept was invoked in particular cases. In *Livingston,* we recognized the Supreme Court's admonition "that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical." *Livingston v. United States,* 627 F.2d at 169 (citing *Kaiser Aetna v. United States,* 444 U.S. at 173). In *Livingston* this court declined to invoke the broad definition of navigability often used in the commerce clause context. The *Livingston* court emphasized that "a functional analysis of 'navigability' " should be employed "so that the limits of governmental authority are determined in accordance with the purposes it serves." *Livingston v. United States,* 627 F.2d at 169.

Accordingly, we hold that in the instant case the territorial application of the Limitation of Liability Act is limited to waters that are navigable in fact for purposes of admiralty jurisdiction. Because, as we have already discussed, the Lake of the Ozarks is not a navigable waterway for purposes of admiralty jurisdiction Three Buoys would not be entitled to the protections afforded under the Limitation of Liability Act.

III. CONCLUSION

We affirm the district court's dismissal of Three Buoys' complaint under the Limitation of Liability Act. Although the district court concluded that it had subject matter jurisdiction, we conclude that it did not.

The district court correctly noted that jurisdiction was not proper under its admiralty jurisdiction because the collision at issue did not occur on navigable waters. We believe that in the absence of admiralty jurisdiction the district court lacked subject matter jurisdiction over this case because the Limitation of Liability Act does not provide an independent source of jurisdiction and this case did not "arise under" federal law for purposes of general federal question jurisdiction. The complaint, therefore, should be dismissed for want of jurisdiction and it is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-141A(1)

In the Matter of the:

Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.

ORDER

(Filed June 27, 1988)

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED that the motions of claimants Harvey G. Morts and Karron Lee Webb, et al. to dismiss the complaint of Three Buoys Houseboat Vacations U.S.A., Ltd. be and are granted.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's admiralty jurisdiction, plaintiff's complaint be and is dismissed for lack of subject matter jurisdiction.

IT IS FURTHER ORDERED that, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint be and is dismissed for failure to state a claim under the Limitation of Liability Act.

IT IS FURTHER ORDERED that the injunction order entered in this action on January 26, 1988 be and is dissolved and declared to be of no effect.

IT IS FURTHER ORDERED that plaintiff's motion for an order noting defaults be and is dismissed as moot.

/s/ John Nangle
United States District Judge

Dated: June 27, 1988.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-141A(1)

In the Matter of the:

Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.

MEMORANDUM

This matter is now before the Court on claimants' motions to dismiss plaintiff's complaint for lack of subject matter jurisdiction. Two jurisdictional questions are presented in this case: (1) whether Lake of the Ozarks, a reservoir formed by Bagnell Dam and located entirely within the State of Missouri, is a "navigable" body of water within the Court's federal admiralty jurisdiction; (2) whether an action pursuant to the Limitation of Liability Act is within the Court's federal question or commerce clause jurisdiction.

I. Background.

Plaintiff Three Buoys Houseboat Vacations U.S.A., Ltd. (Three Buoys) is a Missouri corporation engaged in the business of chartering houseboats on Lake of the Ozarks. Lake of the Ozarks is a body of water in central Missouri which was created by impounding the Osage River by construction of the Bagnell Dam, a dam with no locks to allow passage of vessels. This case arises from a collision between a twenty-foot fiberglass vessel operated by an employee of Three Buoys and the Kantafordit houseboat. The collision occurred at approximately 2:00 a.m. on August 2, 1987 on Lake of the Ozarks. As a result of the collision, two passengers on the houseboat were killed, three other passengers on the houseboat and plaintiff's employee sustained

personal injuries, plaintiff's vessel sank and the houseboat sustained property damages. Several wrongful death, personal injury, and property damage claims have been filed in state court against Three Buoys and its vessel. (Plaintiff's Complaint, ¶10; Plaintiff's Affidavit of Mailing Notice filed March 1, 1988).

Three Buoys filed the present complaint for exoneration from or limitation of liability pursuant to the Limitation of Liability Act, 46 U.S.C. §§181 *et seq.*, to limit its liability in connection with the collision that occurred on Lake of the Ozarks. Plaintiff's complaint alleges that the Court has admiralty jurisdiction pursuant to 28 U.S.C. §1333, or in the alternative, has jurisdiction pursuant to 28 U.S.C. §§1331, 1337. Plaintiff posted security and requested an order restraining and enjoining the prosecution of all suits or legal proceedings against it and issuing notice to claimants directing them to file their claims in federal court. *See* 46 U.S.C. §185. On January 26, 1988, this Court issued a restraining order enjoining suits and issued notice to all claimants directing the filing of claims. Claimants move to dismiss plaintiff's complaint on the ground that Lake of the Ozarks is not a "navigable" body of water within the admiralty jurisdiction of this Court.

II. Admiralty Jurisdiction.

The admiralty jurisdiction of the federal district court is set forth in 28 U.S.C. §1333, which provides in pertinent part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

Congress extended admiralty and maritime jurisdiction to cases arising from personal injury or property damage sustained on navigable waters in the Admiralty Jurisdiction Extension Act, which provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

46 U.S.C. §740.

Under the Limitation of Liability Act, a ship owner's liability for personal injury or property damage is limited to the value of the vessel and its pending freight when the loss is incurred without the owner's privity or knowledge. 46 U.S.C. §183(a);[1] *Valley Line Co. v. Ryan*, 771 F.2d 366, 369 (8th Cir. 1985). This limitation of liability extends to "all seagoing vessels" and to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. §188.[2] The Limitation of Liability Act was enacted to encourage investments in shipbuilding and to provide an opportunity for the complete disposition of claims against a vessel and its owner. *Just v. Chambers*, 312 U.S. 383, 385-386 (1941).

The determination of whether admiralty jurisdiction exists over a maritime tort involves a two-fold inquiry. First, the tort must occur on "navigable" waters. Second, the tort must have a "sufficient nexus" to a traditional maritime activity. *Foremost Insurance Co. v. Richardson*, 457 U.S. 668, 671-674

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[1] 46 U.S.C. §183(a) provides in pertinent part:

> The liability of the owner of any vessel . . . for any loss, damage, or injury by collision . . . incurred, without the privity or knowledge of such owner . . . shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

[2] The Limitation of Liability Act has been supplemented by Admiralty Rules which prescribe procedural requirements for limitation proceedings. *See* Rules A and F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure.

(1982); *Complaint of Paradise Holdings,* 619 F.Supp. 21, 22-23 (C.D.Cal. 1984), *aff'd,* 795 F.2d 756 (9th Cir.), *cert. denied,* 107 S.Ct. 649 (1986).

The Eighth Circuit has held that "navigability", for purposes of admiralty jurisdiction is "properly limited" to waters which have "a present capability . . . to sustain commercial shipping." *Livingston v. United States,* 627 F.2d 165, 170 (8th Cir. 1980), *cert. denied,* 450 U.S. 914 (1981). *See also Land and Lake Tours, Inc. v. Lewis,* 738 F.2d 961, 963 n. 3 (8th Cir.), *cert. denied,* 469 U.S. 1038 (1984) ("present navigability in fact is the linchpin of admiralty jurisdiction"); *Edwards v. Hurtel,* 717 F.2d 1204, 1205 (8th Cir. 1983) (admiralty jurisdiction "turns on contemporary navigability in fact"). In *Livingston,* the Eighth Circuit held that no admiralty jurisdiction existed over an action arising from a death on the Norfolk River which occurred after construction of a hydroelectric dam had closed the river to commercial activity. The court found that a history of commercial activity on the Norfolk River was not determinative of admiralty jurisdiction and that the closing of the river to commercial traffic eliminated admiralty jurisdiction over the river. *Id.* at 169-170. The court explained that "absent some present or potential commercial activity, there is no ascertainable federal interest that justifies frustrating the legitimate interests of the states in providing a forum and applying their law to regulate conduct within their borders." *Id.* at 170 (*citing Adams v. Montana Power Co.,* 528 F.2d 437, 439 (9th Cir. 1975)).

In *Cooper v. United States,* 500 F. Supp. 191 (W.D.Mo. 1980), the United States District Court for the Western District of Missouri applied the *Livingston* decision to an action arising from the death of an individual which occurred as a result of a collision of two motorboats on Lake of the Ozarks. The court

held that Lake of the Ozarks was not within the Court's admiralty jurisdiction. *Cooper,* 500 F.Supp. at 193.[3]

Plaintiff argues that Lake of the Ozarks is a "navigable" body of water within the admiralty jurisdiction of this Court. Plaintiff points out that at the time that Lake of the Ozarks was constructed by the Bagnell Dam, the Osage River was a navigable stream. Plaintiff relies upon *In re Wood's Petition,* 145 F. Supp. 848 (W.D.Mo. 1956), *aff'd sub nom. Loc-wood Boat and Motors v. Rockwell,* 245 F.2d 306 (8th Cir. 1957). In *Wood's Petition,* the district court held, based upon the historical navigability of the Osage River, that Lake of the Ozarks was a "navigable" body of water within the admiralty jurisdiction of the court. The decision was affirmed on appeal.

Plaintiff's reliance upon the historical navigability of the Osage River and the *Loc-wood Boat and Motors* decision is unavailing. In *Livingston,* the Eighth Circuit specifically rejected reliance upon historical navigability as a basis for establishing present admiralty jurisdiction. *Livingston,* 627 F.2d at 170. The *Livingston* court pointed out that in the *Loc-wood Boat and Motors* decision the parties did not challenge the appropriateness of admiralty jurisdiction and the court was not "squarely faced with the question of whether current navigability in fact is required for admiralty jurisdiction." *Livingston,* 627 F.2d at 168 and n. 4. Finally, the *Livingston* court unequivocally stated that "[n]otwithstanding any expressions to the contrary in prior decisions of this court, federal admiralty jurisdiction turns on contemporary navigability in fact," not historical navigability. *Id.* at 170.

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[3] In *Cooper,* plaintiffs apparently conceded that the *Livingston* decision rendered Lake of the Ozarks beyond the court's admiralty jurisdiction. However, the court also stated that it was "convinced that Lake of the Ozarks is not navigable for purposes of admiralty jurisdiction." *Cooper,* 500 F.Supp. at 193.

Plaintiff relies upon several regulatory and administrative determinations of navigability to support its contention that Lake of the Ozarks is a "navigable" body of water within the admiralty jurisdiction of this Court. First, plaintiff relies upon an April 9, 1981 order of the Federal Energy Regulatory Commission (FERC) issuing a license to Union Electric for the operation of the Osage project, which states that the project, Bagnell Dam, is located on the Osage River, "a navigable water of the United States." (*See* Plaintiff's Reply Memorandum, Exhibit A). Under the Federal Power Act, the FERC has authority to issue licenses for the construction of dams and other works. *See* 42 U.S.C. §7172. Plaintiff also argues that Congress' declaration that a portion of the Osage River, at a point well upstream from Lake of the Ozarks, is not navigable, *see* 33 U.S.C. §41, means that the portion of the Osage River containing Lake of the Ozarks is navigable. Plaintiff contends that the continued issuance of permits by the Army Corps of Engineers for construction of obstructions on Lake of the Ozarks (*see* Plaintiff's Reply, Exhibit B), also demonstrates that Lake of the Ozarks is a "navigable" water of the United States within the meaning of 33 C.F.R. §328.3 and 33 C.F.R. §329.4.[4] Finally

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[4] These regulations define "waters of the United States" and "navigable waters" for purposes of defining the authority of the Army Corps of Engineers. Section 328.3 defines "waters of the United States" in pertinent part as follows:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide.

Section 329.4 defines "navigable waters" as follows:

> Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.

plaintiff argues that the Coast Guard inspection of excursion vessels which carry passengers for hire on Lake of the Ozarks is further evidence of the navigability of Lake of the Ozarks.

Definitions of "navigability" for administrative or regulatory purposes are separate and distinct from judicial definitions of navigability for purposes of admiralty jurisdiction. *See Reynolds v. Bradley,* 644 F. Supp. 42, 45 (N.D.N.Y. 1986); *Wilder v. Placid Oil Co.,* 611 F.Supp. 841, 844 (W.D.La. 1985). In *Livingston,* the Eighth Circuit cautioned that determinations of navigability must be viewed in light of the purposes for which the determinations were made, and stated the following:

> The Supreme Court has recently observed that precendent in this area must be evaluated carefully in light of " 'the *purpose* for which the concept of "navigability" was involved in a particular case'." *Kaiser Aetna v. United States,* 444 U.S. 164, 171 . . . The Court in that case identified four separate purposes underlying the definitions of "navigability": to delimit the boundaries of the navigational servitude; to define the scope of Congress' regulatory authority under the commerce clause; to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Act of 1889; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of "navigability."
>
> In *Kaiser Aetna,* the Court noted specifically that Congress' regulatory authority under the commerce clause is historically very broad, and the expansive definitions of navigability developed in commerce clause cases are not really appropriate in other contexts where the actual capability of a stream to support navigation is critical . . . What is required in those contexts is a functional analysis of "navigability," so that the limits of governmental authority are determined in accordance with the purposes it serves.

Livingston, 627 F.2d 165, 169 (8th Cir. 1980) (citations omitted).

The administrative and regulatory determinations relied upon by plaintiff define the scope of the Army Corps of Engineers' authority over certain bodies of water and the scope of Congress' regulatory authority under the commerce clause, not the scope of judicial authority to exercise admiralty jurisdiction. Under a "functional analysis", the Court finds that the plaintiff has failed to establish that Lake of the Ozarks is presently navigable. *See Livingston*, 627 F.2d at 169, 170. The lake is impounded by the Bagnell Dam, the dam has no locks to allow passage of boats from the Osage River into the lake, and the lake lies wholly within the State of Missouri. The Court concludes that Lake of the Ozarks is presently incapable of sustaining commercial shipping and is not "navigable" for purposes of admiralty jurisdiction, and thus, is not within the admiralty jurisdiction of this Court.[5]

III. Alternative Bases of Jurisdiction.

Plaintiff argues that even if no admiralty jurisdiction exists over the limitation proceedings, the Court has federal question or commerce clause jurisdiction over this cause of action pursuant to 28 U.S.C. §§1331, 1337.

Plaintiff contends that the Limitation of Liability Act, an Act regulating commerce, provides its own basis for jurisdiction. Several courts have rejected the contention that the Limitation of Liability Act provides a basis for jurisdiction regardless of the navigability of the body of water involved. *See Marroni v. Matey*, 492 F. Supp. 340, 343 (E.D.Pa. 1980); *In re*

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[5] Because the Court has concluded that the accident did not occur on "navigable" waters, it is not necessary to reach the issue of whether the tort had a "sufficient nexus" to a traditional maritime activity. *See Foremost Insurance Co.*, 457 U.S. 668 (1982).

Builders Supply Co., 278 F.Supp. 254, 256-57 (N.D.Iowa 1968); *In re Howser's Petition*, 227 F.Supp. 81, 85-86 (W.D.N.C. 1964); *In re Madsen's Petition*, 187 F. Supp. 411, 413-14 (N.D.N.Y. 1960). These courts emphasized that the scope of the Limited Liability Act was "co-extensive" with the scope of admiralty jurisdiction. However, none of these cases addressed the precise issue presented in the present case concerning whether an action pursuant to the Limitation of Liability Act arises under federal law or an Act of Congress regulating commerce and, thus, is within the Court's §1331 or §1337 jurisdiction.

The power of Congress to enact the Limitation of Liability Act is "derived both from the power to regulate commerce and from the clause in the Constitution extending judicial power to 'all cases of admiralty and maritime jurisdiction'." *Old Dominion S.S. Co. v. Gilmore* (The Hamilton), 207 U.S. 398, 404 (1907); 3 *Benedict on Admiralty* §3, p. 1-29 (7th Ed. 1986). To base jurisdiction upon §1337, the commerce clause need not be the exclusive source of federal power involved in the statute, it need only be a significant source. *Murphy v. Colonial Federal Savings & Loan Ass'n*, 388 F.2d 609, 615 (2d Cir. 1967). *See generally* 13B Wright, Miller & Cooper, *Federal Practice and Procedure* §3574 (1984). The courts have held that suits under the Merchant Marine Act of 1920 (Jones Act), 46 U.S.C. §688, which was enacted pursuant to Congress' power to regulate commerce and power to make laws necessary and proper to carry out the Court's power over admiralty and maritime cases, arise under an Act regulating commerce and are within the court's section 1337 jurisdiction. *See Ballard v. Moore-McCormick Lines, Inc.*, 285 F. Supp. 290, 295-96 (S.D.N.Y. 1968); *Richardson v. St. Charles-St. John the Baptist Bridge & Ferry Authority*, 274 F. Supp. 764, 767-69 (E.D.La. 1967). The courts have likewise held that other shipping laws are within the §1337 jurisdiction of the federal courts. *See Maritime Service Corp. v. Sweet Brokerage De Puerto Rico, Inc.*, 537 F.2d 560 (1st Cir. 1976) (Shipping and Intercoastal Shipping Acts);

Crispin Co. v. Lykes Bros. Steamship Co., 134 F. Supp. 704 (S.D.Tex. 1955) (Carriage of Goods by Sea Act); *see also Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984) (Section 1331 jurisdiction exists over Steamboat Inspection Act claim).

The existence of commerce clause or federal question jurisdiction does not turn upon the present navigability of a body of water. *See Land and Lake Tours, Inc. v. Lewis*, 738 F.2d 961 (8th Cir.), *cert. denied*, 469 U.S. 1038 (1984). In *Land and Lake Tours, Inc.*, the Eighth Circuit held that federal question jurisdiction existed over a lake which was not presently navigable in fact, but which was navigable in its "natural and ordinary condition." *Id.* at 964. Although Lake of the Ozarks is not currently navigable for purposes of admiralty jurisdiction, the portion of the Osage River containing the lake was navigable in its natural and ordinary condition before it was obstructed by the Bagnell Dam to form Lake of the Ozarks. Therefore, notwithstanding the lack of admiralty jurisdiction, this Court has jurisdiction, pursuant to 28 U.S.C. §§1331 and 1337, over this limitation proceeding which arises under an Act of Congress regulating commerce.

Having concluded that federal question jurisdiction exists over this limitation action, the Court must now determine whether the Limitation of Liability Act applies to the present case which involves a collision between vessels on non-navigable waters. Congress enacted the Limitation of Liability Act in 1851 to encourage investment in the American maritime industry. *See Matter of Sisson*, 668 F. Supp. 1196, 1198 (N.D.Ill. 1987). The focus of the statute was entirely upon commercial shipping. *See Complaint of Shaw*, 668 F. Supp. 524, 526 (S.D.W.Va. 1987). Congress recognized that many foreign countries involved in maritime commerce maintained laws limiting the tort liability of ship owners. *Matter of Sisson*, 668 F. Supp. at 1198. Without limited liability, the American merchant marine was at a competitive disadvantage in the maritime

world market. The Limitation of Liability Act was designed to place American maritime trade on an "equal footing" with the competing European maritime industry which already enjoyed limited liability, not to protect commerce on inland lakes. *In re Stephens,* 341 F. Supp. 1404, 1405-06 (N.D.Ga. 1965).

Plaintiff argues that the Limitation of Liability Act is not expressly limited, by its terms, to vessels on "navigable" waters, but is applicable to "all vessels" on "lakes or rivers or inland navigation." *See* 46 U.S.C. §188. Section 188 was amended in 1886 to make the Limitation of Liability Act applicable to "all vessels used on lakes or rivers or inland navigation." 46 U.S.C. §188; G. Gilmore & C. Black, Jr., *The Law of Admiralty,* 843-44 (2d Ed. 1975). The earlier version of section 188 had excluded "owners of any canal boat, barger or lighter . . . used in rivers or inland navigation" from the protection of the Act. Gilmore & Black at 843-44. The amendment was designed to make the Act applicable to all vessels regardless of the purposes for which they were used, *see Petition of Liebler,* 19 F. Supp. 829, 832 (W.D.N.Y. 1937), not to extend the Act to vessels on non-navigable waters. Professors Gilmore and Black have observed that the Limitation of Liability Act only applies when the "structure seeking the benefit of the Limitation Act qualifies as a 'vessel' " within the meaning of section 188 and "the event giving rise to the claims occurred on navigable waters within the Admiralty jurisdiction" of the court. *Id.*

The Court concludes that application of the Limitation of Liability Act is properly limited to incidents occurring on waters which are "navigable" for purposes of admiralty jurisdiction and does not extend to a collision on non-navigable waters. Exercise of federal jurisdiction over this collision between two vessels on waters which lie wholly within the State of Missouri and which are closed to commercial shipping would not advance the purposes underlying the Limitation of Liability Act and would undermine the interests of the state in providing a forum for claims arising out of conduct occurring on its internal water-

ways. If application of the Limitation of Liability Act was not confined to "navigable" waters, then every boat owner on every inland lake with no connection with maritime commerce would be within the reach of the limitation statute. Congress did not intend this result. Therefore, to the extent that plaintiff seeks to invoke the Court's general federal question or commerce clause jurisdiction, plaintiff's complaint is dismissed for failure to state a claim under the Limitation of Liability Act. *See* Fed.R.Civ.P. 12(b)(6); 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1357 at 593 (1969).

/s/ John Nangle
United States District Judge

Dated: June 27, 1988.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

JUDGMENT

(Filed July 5, 1989)

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A., Ltd., etc.,

Appellant,

v.

Harvey G. Morts, et al.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

July 5, 1989

A true Copy:

Attest:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.
Mandate Issued: 10/18/89

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2436EM

In the Matter of the Complaint of Three Buoys Houseboat Vacations U.S.A. Ltd., as owners of one 1977 Chriscraft 20' fiberglass vessel, Vessel No. MO-3136-AT, for exoneration from or limitation of liability,

Appellant,

vs.

Harvey G. Morts, et al.,

Appellees.

Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge McMillian voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

October 4, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

Constitution of the United States

Article I, Section 8, Clause 3. Regulation of Commerce

[The Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article I, Section 8, Clause 9. Creation of Tribunals Inferior to Supreme Court

[The Congress shall have Power] To constitute Tribunals inferior to the supreme Court;

Article I, Section 8, Clause 18. Enactment of Laws for Execution of Governmental Powers

[The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article III, Section 2, Clause 1. Jurisdiction of Courts

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * * -to all Cases of admiralty and maritime Jurisdiction; * * *.

Statutes

1 U.S.C. § 3. "Vessel" as including all means of water transportation

The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

28 U.S.C. § 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: * * *.

33 U.S.C. § 41. Osage River, Missouri

The Osage River in the State of Missouri above the point where the south line of sections 15 and 16 in township 40 north, of range 22 west, of the fifth principal meridian, and in the county of Benton, State of Missouri, crosses said river, is declared not to be a navigable stream, and shall be so treated by the Secretary of the Army and by all other authorities.

33 U.S.C. § 2001. Application (Rule 1)

(a) United States inland waters and Canadian waters of Great Lakes

These Rules apply to all vessels upon the inland waters of the United States * * *.

46 U.S.C. § 183. Amount of Liability; Loss of life or bodily injury; privited imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

46 U.S.C. § 185. Petition for limitation of liability; deposit of value of interest in court; transfer of interest to trustee

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 188. Limitation of liability ow owners applied to all vessels

Except as otherwise specifically provided therein, the provisions of section 182, 183, 183b-187, and 189 of this title shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters.

46 U.S.C. App. § 740. Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period.

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water * * *.

Procedural Rules

Fed.R.Civ.P.Supp. Rule A. Scope of Rules

These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:

* * *

(4) Actions for exoneration from or limitation of liability.

* * *

The general rules of Civil Procedure for the United States District Courts are also applicable to the foregoing procedings except to the extent that they are inconsistent with these Supplemental Rules.

Fed.R.Civ.P.Supp. Rule F. Limitation of Liability

(1) Time for filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the

complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without fil-

ing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.

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No. 89-1052 (2)

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THREE BUOYS HOUSEBOAT VACATIONS
U.S.A., LTD., *Petitioner*,

v.

HARVEY G. MORTS, et al.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On August 2, 1987, at approximately 1:30 a.m., a 20 foot speedboat operated by an employee of petitioner, collided with a houseboat that had its lights on and was anchored out of the channel of Lake of the Ozarks, killing two and injuring other persons on board.

Petitioner seeks to limit its liability to $250.00, by applying the Limitation of Liability Act. 46 U.S.C. 183, *et seq.*

The Lake of the Ozarks lies entirely within the State of Missouri. No vessel on Lake of the Ozarks can navigate across a state line.

SUMMARY OF THE ARGUMENT

A writ of certiorari should not be granted because there is no conflict between the circuits or between any courts regarding the jurisdictional scope of the Limitation of Liability Act, and because whether or not admiralty jurisdiction exists for Lake of the Ozarks is a matter of strictly local concern. Petitioners raise only moot or settled issues.

ARGUMENT

Petitioner asks that the Limitation of Liability Act be applied wherever there is Commerce Clause jurisdiction. Petitioner's argument was rejected one hundred years ago. To accept it now would have disastrous results. Petitioner presents no reason for making such a fundamental change.

Federal admiralty jurisdiction is the basis of authority for the Limitation of Liability Act. Territorial application of the Act is necessarily coextensive with the existence of admiralty jurisdiction. This has long been the rule. See, Norwich Co. v. Wright, 80 U.S. 104 (1871); The Main v. Williams, 152 U.S. 122 (1894).

In Butler v. Boston & Savannah Steamship Co., 130 U.S. 527 (1889), the

Court said:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country, and therefore it is coextensive, in its operation, with the whole territorial domain of that law."

Id., at 555. Also:

> "It is clear, then, that the law of limited liability of ship owners is a part of our Maritime Code, the extent of its territorial operation (as before intimated) cannot be doubtful. It is necessarily coextensive with that of the general admiralty and maritime jurisdiction, and that by the settled law of this country extends wherever public navigation extends--on the sea and the great inland lakes, and the navigable waters connecting therewith."

Id., at 557.

The purpose of the Limitation of Liability Act, to encourage investment in ship building by limiting the potential liability of investors, is now satisfied by the use of corporations and insurance. The Act is disfavored, and

its further expansion is inveighed against. Maryland Casualty Co. v. Cushing, 347 U.S. 409, 437 (1954).

The history of the development of and the interplay between the Commerce Clause and the Admiralty Clause as a basis for jurisdiction is discussed in Frankfurter, The Commerce Clause Under Marshall, Taney and Waite (1937, reprinted 1964); Stolz, Pleasure Boating and Admiralty: Erie at Sea, 51 Calif. L.Rev. (1963); and Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L.Rev. 1214 (1954). In the course of that development, the Limitation of Liability Act was made to depend upon admiralty jurisdiction and not upon Commerce Clause jurisdiction.

That the Limitation of Liability

Act depended upon admiralty jurisdiction and not upon Commerce Clause jurisdiction was decided in In re Garnett (The Katie), 141 U.S. 1 (1891). This case should be considered in light of effect that the 1886 amendments to the Act had upon the reasoning of the Court in Lord v. Goodall, Nelson & Perkins Steamship Co., 102 U.S. 541 (1881). The arguments and issues, and their disposition, in In re Garnett are more apparent when reference is made to the lower court's decision, The Katie, 40 F. 480 (S.D. Ga. 1889), and to the annotations of the parties' briefs in the Lawyers Edition report of the Court's decision. 35 L.Ed 631.

Given the *de minimis* effect requirement for commerce clause jurisdiction, Wickard v. Filburn, 317 U.S. 111 (1942), and given the statutory defini-

tion of vessel as any artificial contrivance capable of being used as a means of transportation on water, 1 U.S.C. 3, if the Limitation of Liability Act were to be applied wherever there was commerce clause jurisdiction, the Act would apply broadly even to pleasure boats on small municipal lakes and reservoirs. Applying the Act so broadly does not further the proper accommodation of state and federal interests in this type of water related activity. Such activities should be governed by the respective states, and not be made federal cases.

The argument that the Limitation of Liability Act provides federal question jurisdiction in the absence of admiralty jurisdiction, should not be considered because even if such jurisdiction exist-

ed, the ultimate result would be unchanged: that the Act does not apply to injuries such as in this case that occur outside of admiralty jurisdiction, *i.e.*, on waters such as Lake of the Ozarks that are not capable of sustaining interstate navigation. The question of the federal question jurisdiction is academic, and should be reserved for a case where it is in controversy.

CONCLUSION

Respondents request that the petition for writ of certiorari be denied.

RESPECTFULLY SUBMITTED.

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(3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THREE BUOYS HOUSEBOAT VACATIONS U.S.A., LTD.,
Petitioner,

vs.

HARVEY G. MORTS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit
and Request for Summary Reversal

SUPPLEMENTAL BRIEF OF PETITIONER

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On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit
and Request for Summary Reversal

SUPPLEMENTAL BRIEF OF PETITIONER

On January 22, 1990, this Court granted certiorari in Docket No. 88-2041, *Sisson v. Ruby,* limited to Questions 1 and 2 presented by the petition. 58 U.S.L.W. 3467. This Court further requested that the parties brief and argue the question of whether or not the Court should reconsider its decision in *Richardson v. Harmon,* 222 U.S. 96 (1911). The issues to be addressed in *Sisson* directly concern this petition for a writ of certiorari and, therefore, petitioner[1] respectfully requests that this

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[1] The Rule 28.1 list of petitioner Three Buoys Houseboat Vacations U.S.A., Ltd. appears at p.ii of its Petition for a Writ of Certiorari and Request for Summary Reversal and is incorporated herein by this reference.

Court grant certiorari and consolidate this matter for briefing and argument with *Sisson*. In the alternative, petitioner requests that this Court summarily reverse the United States Court of Appeals for the Eighth Circuit and remand the same to the district court for appropriate disposition.

The petition for writ of certiorari filed by petitioner in this matter seeks to determine whether the Limitation of Liability Act provides a basis for jurisdiction in the district courts independent of admiralty jurisdiction under 28 U.S.C. § 1333 and whether the Act applies "to vessels used on lakes or rivers or in inland navigation..." as its express terms mandate.

In *Richardson v. Harmon,* 222 U..S. 96 (1911), this Court held that the Limitation of Liability Act vested the district court with jurisdiction to entertain proceedings to limit liability arising from non-maritime torts.

Petitioner contends that the scope of the Limitation of Liability Act is broader than the general admiralty jurisdiction of the district courts. This view is supported by this Court's decision in *Richardson v. Harmon,* 222 U.S. 96 (1911) and by the plain language of the Act.[2] The Solicitor General concurs. In his Brief for the United States as Amicus Curiae in *Sisson* (at p.9), the Solicitor General states "In *Richardson v. Harmon, supra,* however, the Court uncoupled the Limitation of Liability Act from general admiralty jurisdiction."

The Limitation of Liability applies "to all vessels used on lakes or rivers or in inland navigation...." If the right to limitation of liability is not dependent upon the maritime nature of the liability, then jurisdiction under the Limitation of Liability Act is not coextensive with admiralty tort jurisdiction.

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[2] 46 U.S.C. App. §188 states that the Limitation of Liability Act shall apply "to all vessels used on lakes or rivers or in inland navigation...."

As suggested by the Solicitor General in footnote 10 of his brief in *Sisson,* the decision of the Eighth Circuit in this matter is difficult to square with *Richardson v. Harmon, supra.* The decision of the Eighth Circuit reflects a reluctance to completely sever any tie between the Limitation of Liability Act and general admiralty jurisdiction. The express terms of the Limitation of Liability Act and this Court's prior decision in *Richardson v. Harmon, supra,* do not justify restricting the application of the Limitation of Liability Act to matters within the general admiralty jurisdiction. If the Act was intended to encourage investment in ships and to encourage shipbuilding, that purpose is served, and Congress can validly promote that purpose, whenever a vessel is used as an instrumentality of interstate commerce. This is the only interpretation which gives meaning to the phrase in the Act which states that it shall apply to "all vessels used on lakes or rivers or in inland navigation...." 46 U.S.C. App. §188.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari and consolidate this matter with *Sisson v. Ruby,* Docket No. 88-2041, for briefing and argument. In the alternative, petitioner respectfully requests that this Court summarily reverse the decision of the United States Court of Appeals for the Eighth Circuit and remand this matter to the district court for appropriate disposition. As a final alternative, petitioner respectfully requests that this Court grant certiorari and consolidate this matter with *Endsley v. Young,* Docket No. 89-30, resubmitted to the conference on January 19, 1990, for briefing and argument should certiorari be granted therein.

Respectfully submitted,

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